

OSSE
Office of Dispute Resolution
January 25, 2023

Parent on Behalf of Student, ¹	HEARING OFFICER’S DETERMINATION
Petitioner,	Hearing Dates: December 22, 2022 January 9, 2023 January 10, 2023
v.	Counsel for Each Party listed in Appendix A
District of Columbia Public Schools (Local Education Agency “LEA”)	
Respondent.	<u>Hearing Officer:</u> <u>Coles B. Ruff, Esq.</u>
Case # 2022-0176	
Date Issued: January 25, 2023	

¹ Personally identifiable information is in the attached Appendices A & B.

JURISDICTION:

The hearing was conducted, and this decision was written, pursuant to the Individuals with Disabilities Act ("IDEA"), P.L. 101-476, as amended by P.L. 105-17 and the Individuals with Disabilities Education Improvement Act of 2004, the District of Columbia Code, Title 38 Subtitle VII, and the District of Columbia Municipal Regulations, Title 5A Chapter E30.

BACKGROUND AND PROCEDURAL HISTORY:

The student who is the subject of this due process hearing ("Student") resides with Student's mother ("Petitioner") in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student attends a DCPS school ("School A") where Student has attended since school year ("SY") 2019-2020.

The student who is the subject of this due process hearing ("Student") resides with Student's mother ("Petitioner") in the District of Columbia. The District of Columbia Public Schools ("DCPS" or "Respondent") is Student's local education agency ("LEA"). Student attends a DCPS school ("School A") where Student has attended since school year ("SY") 2019-2020.

On June 2, 2022, Petitioner, through her attorney, initiated a request to DCPS for an initial evaluation to determine whether Student was eligible for special education and related services.

In August 2022, DCPS completed a psychological evaluation and an occupational therapy evaluation. On September 14, 2022, DCPS convened an eligibility meeting to review the evaluations and determine Student's eligibility or ineligibility for special education and related services. The team determined that Student did not meet the criteria for eligibility for special education and related services.

On September 30, 2022, Petitioner filed her due process complaint ("DPC") asserting DCPS had denied Student a free appropriate public education ("FAPE") by failing to identify Student under its child find obligations, failed to timely and appropriately evaluate Student, failed to determine Student eligible for special education on September 14, 2022, and failed to provide Petitioner with Student's full educational records.

Petitioner seeks a finding that Student was denied a FAPE, and that the undersigned independent hearing officer ("IHO") find Student eligible for special education and order DCPS to do the following: (1) convene an IEP team to develop an individualized education Program (IEP), (2) complete or authorize an independent educational evaluation ("IEE") for a vocational assessment/evaluation, speech and language evaluation and/or functional behavioral assessment ("FBA"), (3) reconvene an IEP meeting upon completion of the above referenced evaluations to review and revise Student's IEP and/or develop a behavior intervention plan ("BIP"), and provide Student compensatory education.

LEA Response to the DPC:

DCPS filed a timely response to the complaint on October 11, 2022. In its response, DCPS stated, inter alia, the following:

On September 14, 2022, the Multi-Disciplinary Team (MDT) held an eligibility meeting where it was determined that Student does not qualify under IDEA for special education services. Student was recommended for a Seciton 504 Plan ("504 plan). The parent was provided the opportunity to participate fully in the eligibility discussion and did so — her concerns and objections were heard and noted. Accommodations for Student for mathematics include study skills four days a week, small group mathematic sessions, math intervention group. Student has connected and engaged with therapeutic services. Student's attendance has improved.

On October 6, 2022, DCPS asked Petitioner to identify specific records that were not in their possession. Petitioner failed to clarify how any potential outstanding records requests prevented her from participating fully in the eligibility process. DCPS denies that Student was denied a FAPE as Student is not eligible for special education services under IDEA.

Resolution Meeting and Pre-Hearing Conference:

Petitioner and DCPS participated in a resolution meeting on October 14, 2022. The parties did not mutually agree to shorten the 30-day resolution period. The 45-day period began on October 30, 2022, and ends [and the Hearing Officer's Determination ("HOD") was originally due] on December 14, 2022. Respondent's counsel and/or witness(es) was unavailable on the hearing dates offered by the IHO and Respondent filed a motion to continue the hearing and extend the HOD due date. The HOD was then due January 18, 2023. At the conclusion of the due process hearing, the parties agreed to an extension of the HOD due date to allow for written closing arguments that were submitted by January 17, 2023. The HOD is now due Janaury 25, 2023.

The IHO conducted a pre-hearing conference and, on November 8, 2022, issued a pre-hearing order ("PHO") outlining, inter alia, the issues to be adjudicated.

ISSUES:²

The issues adjudicated are:

1. Did DCPS deny Student a FAPE by failing to identify Student as eligible for special education services under the classification of emotional disturbance ("ED") based on the data that was available at the eligibility meeting held in September 2022, and/or to timely develop an individualized education program for Student?
2. Did DCPS deny Student a FAPE by failing to timely and comprehensively evaluate for special education pursuant to its child find obligations under the IDEA within two years prior to the filing of the complaint?³
3. Did DCPS deny Student a FAPE by failing to provide the Petitioner with access to Student's educational records?

² The IHO restated the issues at the outset of the due process hearing, and the parties agreed that these were the issues to be adjudicated.

³ Petitioner asserts that the evaluation was not sufficiently comprehensive because it did not include a speech and language evaluation, and the psychological evaluation did not include a classroom observation and teacher rating scales.

DUE PROCESS HEARING:

The Due Process Hearing was convened on December 22, 2022, January 9, 2023, and January 10, 2023. The parties agreed to an extension of the HOD due date to allow for closing arguments that were submitted on January 17, 2023. The HOD is now due January 25, 2023.

RELEVANT EVIDENCE CONSIDERED:

The IHO considered the testimony of the witnesses and the documents submitted in each party's disclosures (Petitioner's Exhibits 1 through 46 and Respondent's Exhibits 1 through 55) that were admitted into the record and are listed in Appendix 2.⁴ The witnesses testifying on behalf of each party are listed in Appendix B.⁵

SUMMARY OF DECISION:

Petitioner held the burden of persuasion on all issues adjudicated. Petitioner sustained the burden of persuasion on issue #1, but did not sustain the burden of persuasion on the remaining issues. The IHO found Student eligible for special education and directed in the order below that DCPS convene an IEP meeting and develop an IEP for Student. The IHO allowed Petitioner to seek compensatory education once an IEP is developed for the time that Student should have been eligible until the date of this HOD.

FINDINGS OF FACT:⁶

1. Student resides with Student's mother, Petitioner, in the District of Columbia. DCPS is Student's LEA. Student attends School A, a DCPS school, where Student has attended since SY 2019-2020. (Parent's testimony)

⁴ Any item disclosed and not admitted or admitted for limited purposes was noted on the record and is noted in Appendix A.

⁵ Petitioner presented four witnesses: (1) Student, (2) Student's mother, (3) a family friend who has assisted Student with schoolwork outside of school and who is a special education teacher, designated an expert witness, (4) a psychologist associated with the law firm representing parent and who participated in the eligibility meeting, designated an expert witness, and (5) an employee of the law firm who testified about educational record requests. Respondent presented three witnesses, designated as expert witnesses: (1) a School A special education teacher, (2) a School A psychologist, (3) a DCPS psychologist who evaluated Student. The IHO found the witnesses credible unless otherwise noted in the conclusions of law. Any material inconsistencies in the testimony of witnesses that the IHO found are addressed in the conclusions of law.

⁶ The evidence (documentary and/or testimony) that is the source of the Findings of Fact ("FOF") is noted within parentheses following the finding. A document is noted by the exhibit number. If there is a second number following the exhibit number, that number denotes the page of the exhibit from which the fact was obtained. When citing an exhibit that has been submitted by more than one party separately, the IHO may only cite one party's exhibit.

2. During Student's initial year at School A, Student earned 7 credits toward a high school diploma, and had a grade point average ("GPA") of 2.67. and class rank of 103 of 139 students in August 2021. (DCPS's Exhibit 37)
3. During Student's second year at School A (SY 2020-2021) Student earned an additional 6.5 credits toward a high school diploma and received passing grades in all classes. Because of the Covid-19 health emergency that school year, in accordance with School A's policy, for most of the courses Student completed Student earned a passing grade "P" in lieu of a typical letter grade. In three other courses that year, Student received above average grades. The "P" grades were no included in a calculation of Student's GPA. (DCPS's Exhibit 38)
4. As of August 12, 2021, Student had 13.5 credits toward a high school diploma, and Student held a class rank was 103 out of of 139 students in Student's grade at School A. (DCPS's Exhibit 37)
5. On or about October 23, 2021, the student was hospitalized at [REDACTED] where [REDACTED] was diagnosed with a Major Depressive Disorder following a suicide attempt. After the October 2021 hospitalization, the student began receiving outside counseling services. After the student returned to school following the October 2021 hospitalization some academic interventions were put into place such as making online services available and credit recovery with individualized support. (Petitioner's Exhibit 17, Student's testimony)
6. During SY 2021-2022, Student earned 5 additional credits toward a high school diploma. Student withdrew from one class and failed one class during 2021-2022. Otherwise, Student grades were below average in two of the remaining. Student earned a "P" in college algebra and "C" in biology. (DCPS's Exhibit 38)
7. Student had the following grades during SY 2021-2022:

Progress Report Card 2020-2021	Year 1 Term 4 Report Card
Advisory HS	P
College Biology	Incomplete
College Language	Incomplete
College Year 1 Seminar I	D+
College Year 1 Seminar II	D+
College Algebra Recovery	P
College Pre-Calculus	Withdrawn

8. On June 2, 2022, DCPS received a referral for an initial evaluation to determine whether Student was eligible for special education and related services. DCPS prepared and analysis

of existing data (“AED”) in which Student’s academic, social emotional-emotional and other areas of concern were reviewed and summarized. The AED report noted the following: “[Student] took the i-Ready assessment January 30, 2019, during the middle of the year which [Student] scored below grade level with a scale score of 506, and at the end of the year, June 2019, [Student’s] reading level scale score dropped to 494. These scores on the reading assessment, according to the I-ready placement table for 2018-2019, places the student at 3rd grade level for the score of 506 and below 3rd grade at the 494 score. At the end of the school term of June 2019, [Student’s] Lexile was 556, below basic for [Student’s] age and grade. According to the Lexile Chart, a Lexile of 556 is 3rd grade level.” The AED report also noted that when Student took the PARCC assessment in April 2019, Student was operating below grade level in math. (DCPS’s Exhibit 11)

9. The AED report noted that during SY 2021-2022, according to the Aspen grade report, Student did not successfully pass Algebra I in the first semester. The AED report states: “[Student] avoids completing work in [Student’s] math courses and is challenged by the grade level work that is required... The AED Student’s grades for Semester 1 in reading intensive courses include: College Year 1 Seminar I, 63%; College Year 1 Seminar II, 62%. ■■■ is currently earning a 36% in College Year 1 Seminar I and a[n] 88% in Psychology during Term 4 fo this school year.” (DCPS’s Exhibit 11)
10. Starting in June 2022, Petitioners attorney has sent School A email correspondence requesting that School A provide Student’s educational records. (Petitioner’s Exhibit 28, 29, 30, 31)
11. On June 24, 2022, DCPS convend an AED meeting, in which Petitioner participated, to review data and determine next steps in evaluating Student for special education. The team determined, based on the data reviewed, that DCPS would conduct a comprehensive psychological evaluation and an occupational therapy evaluation. DCPS issued a prior written notice (“PWN”) to that effect on June 27, 2022. (DCPS Exhibits 11, 12).
12. On June 28, 2022, Petitioner provided DCPS a signed consent authorization for DCPS to evaluate Student to determine whether Student was eligible for special education and related services. (DCPS’s Exhibit 10)
13. DCPS conducted a comprehensive psychological evaluation of Student in July and August 2022. The evaluation report is dated August 23, 2022. The evaluator, a DCPS psychologist, considered the possibility of Student qualifying as a child with a disability for specific learning disability (“SLD”), emotional disturbance (“ED”) and/or other health impairment due to Attention Deficit Hyperactivity Disorder (“ADHD”). The evaluator noted that Student existing diagnosis of Major Depressive Disorder and that Student was currently prescribed medication for that condition. (DCPS’s Exhibit 17, Witness 6’s testimony)

14. The evaluator assessed Student's cognitive, academic, social-emotional, and attention/executive functioning. The evaluator reviewed Student's academic records and attendance. The evaluation included the following interviews and assessments : Teacher, Parent, and Student Interviews, Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2), Woodcock-Johnson IV Tests of Achievement (WJ-IV ACH), Form A, Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2) (Teacher, Parent), Reynolds Adolescent Depression Scale -2 (RAD-2), COVID-19 IMPACT Profile Checklist, CYW Adverse Childhood Experiences Questionnaire (ACE-Q) Teen Self-Report, Standardized Assessments (Reading Inventory, SAT, PSAT) (DCPS's Exhibit 17, Witness 6's testimony)
15. The evaluator noted the following about Student's performance on the assessments that were administered: "[Student's] academic effort is limiting and [Student] wants to answer and finish the assessment quickly. [Student] continued to express unhappy feelings about school and [Student's] life now. [Student] did give the assessment some effort but I believe with more tolerance, perseverance, and increased motivation [Student] would have done better. At times, [Student] was able to read passages at the college level. Other times [Student] would just answer "I don't know." Without trying to give a response. In addition, on some lower-level math problem, [Student] did not give the correct answer but was then able to correctly complete a college-level math problem. While [Student] was sad and, at times lacked effort, I believe this is how [Student] is in the school setting. At times, I was able to see [Student's] true ability to compose writings or complete math problems and at other times, [Student] was choosing to not respond. [Student] seems to lack the emotional energy to persist. [Student] did not seem to be experiencing any stress and the assessment is valid." (DCPS's Exhibit 17)
16. Student's cognitive functioning as average. Student had the following scores in the cognitive assessment that the evaluator administered:

RIAS-2 Composite Score Summary			
Scale	Index Scores	Percentile Rank	Qualitative Description
Verbal Intelligence Index (VIX)	90	25	Average
Nonverbal Intelligence Index (NIX)	94	34	Average
Composite Intelligence Index (CIX)	91	27	Average
Speeded Processing (SPI)	97	42	Average

(DCPS's Exhibit 17)

17. The evaluator administered the Woodcock Johnson IV (WJ-IV), Tests of Achievement to measure Student's academic functioning. Student's academic functioning was assessed as Average, except in the areas of math, which were Low Average. Although Student's academic performance was generally average, Student's scores were generally three years

below Student's actual age, except in written language. Student had the following academic scores:

<u>CLUSTER/Test</u>	<u>AE</u>	<u>RPI</u>	<u>SS Classification</u>	<u>SS PR</u>
READING	13-4	70/90	Average	90 25
BROAD READING	13-9	71/90	Average	91 28
MATHEMATICS	13-2	73/90	Average	91 27
BROAD MATHEMATICS	12-5	63/90	Low Average	87 20
MATH CALCULATION SKILLS	11-9	45/90	Low Average	84 15
WRITTEN LANGUAGE	15-2	85/90	Average	96 40
BROAD WRITTEN LANGUAGE	16-10	89/90	Average	99 47
WRITTEN EXPRESSION	24	91/90	Average	101 54
ACADEMIC SKILLS	13-5	73/90	Average	91 28
ACADEMIC FLUENCY	13-6	75/90	Average	92 30
ACADEMIC APPLICATIONS	14-3	81/90	Average	93 32
BRIEF ACHIEVEMENT	15-1	83/90	Average	95 38
BROAD ACHIEVEMENT	13-8	76/90	Average	91 28
Letter-Word Identification	14-3	77/90	Average	93 33
Applied Problems	16-5	87/90	Average	98 45
Spelling	15-3	84/90	Average	96 40
Passage Comprehension	12-3	61/90	Low Average	87 19
Calculation	12-0	52/90	Low Average	86 18
Writing Samples	15-0	87/90	Average	97 42
Sentence Reading Fluency	14-4	72/90	Average	94 35
Math Facts Fluency	11-7	39/90	Low Average	84 14
Sentence Writing Fluency	>30	94/90	Average	107 68

(DCPS's Exhibit 17)

18. The evaluator noted the following regarding Student's social-emotional functioning: "[Student] was hospitalized at [REDACTED] from October 23 to October 29, 2021 after making a suicide attempt by taking several pills. This incident was precipitated by the break-up of [Student's] relationship with [Student's partner] which had occurred a month or so earlier. [Student] was diagnosed with Major Depressive Disorder and placed on Prozac. In February of 2022, [Student] began seeing Ms. [REDACTED], LGSW for therapy. [Student] is still very affected and tearful when [Student] discusses the breakup. This is a major stressor for [Student] and [Student] reports [Student's] is still trying to heal from the resolution of the relationship." (DCPS's Exhibit 17)
19. The evaluator reported the following from her interview of Student: "Student shared that Student does not enjoy school. Student has had conflicts with peers and would like to attend another school this upcoming school year. [Student] struggles with [Student's] mother's decision for her to remain at School A and [graduate]. [Student] recognizes that [Student] is depressed and struggles with completing tasks. [Student] finds math particularly difficult and wants additional support in math." (DCPS's Exhibit 17, Witness 6's testimony)
20. The evaluator was not able to assess Student for ADHD/OHI because school was not in session. Although Student had an elevated profile in executive functioning, the psychologist needed to assess in the school setting to gauge the full impact. In the evaluation

report, the evaluator reviewed and addressed the criteria of the three categories of disability which were considered. The evaluator concluded that based upon the assessment data, Student did not meet the criteria for the disability classifications of SLD and OHI due to ADHD. (DCPS's Exhibit 17, Witness 6's testimony)

21. The evaluator concluded that Student met one criterion under IDEA for ED disability, specifically "a general pervasive mood of unhappiness or depression." Nonetheless, the evaluator concluded Student did not meet the criteria for ED, principally because Student had not been provided and received two researched based interventions prior to the consideration of Student's identification as ED. This additional requirement was instructed by OSSE as result of a determination that there has been an "overidentification" of ED students. (DCPS's Exhibit 17, Witness 6's testimony)
22. Regarding the ED consideration, the evaluator noted the following: [Student] was diagnosed with Major Depressive Disorder in October of 2021. [Student] was able to begin therapy in February of 2022. Unfortunately, two research-based interventions were not completed with documentation. [Student] was referred to Ms. [REDACTED], social worker. [Student] reports that [Student] met a couple time with Ms. [REDACTED] but does not want to continue working with Ms. [REDACTED]. The first criteria for having an Emotional Disturbance is that "two scientific research-based interventions that are based on a problem-solving model that addresses behavioral/emotional skill deficiency and documentation of the results of the intervention, including progress monitoring documentation." This was not done last year and needs to be tried before the team can determine if [Student] qualifies as a student with an emotional disturbance." (DCPS's Exhibit 17)
23. On September 14, 2022, DCPS convened an eligibility meeting to review the evaluations and determine Student's eligibility or ineligibility for special education and related services. The team determined that Student did not meet the criteria for eligibility for special education and related services. Petitioner, her attorney, and educational advocate participated in the meeting and did not agree with the team's determination of ineligibility. (DCPS's Exhibits 21, 22, 23, Petitioner's Exhibit 23, Witness 2's testimony)
24. On October 4, 2022, DCPS developed a 504 plan for Student that included period check-ins with the teacher and school psychologist, regular communication of Student's progress in school and extended time and frequent breaks in testing and assignments. (DCPS Exhibit 53, Petitioner's Exhibits 25, 26)
25. In December 2022, a DCPS psychologist completed an addendum to the psychological evaluation that included an assessment of ADHD that was not conducted as part of the initial evaluation because Student was not in school at the time and no teachers were available to provide rating scales. Based upon the assessment, the psychologist concluded that Student did not meet the criteria for OHI due to ADHD. (DCPS's Exhibit 52)
26. As of December 2022, Student had 18.5 credits toward a high school diploma, a GPA of 2.39 and held a class rank of 103 out of 123. The credits do not include the course for which Student's withdrew and carried a Final Grade of "W." (DCPS's Exhibit 38)

27. School A is a highly academic school. There is a lot of reading and writing. Most of the faculty have taught on the college level and have high expectations for students. Students are accepted by application and recommendation and interview. Student did not well academically during SY 2021-2022. In some classes Student continues to struggle, and Student is currently failing a class. In class Student is usually more engaged with Student's cell phone and connecting with peers, rather than focusing on the instruction. (Witness 4's testimony)
28. Student's disorder impacts Student's motivation and willingness to complete assignments and Student's energy to complete daily tasks. School A has developed an academic plan for Student in addition to the Seciton 504 plan. Pursuant to the academic plan, Student meets weekly with the School A psychologist to discuss Student's academics and social emotional concerns. Student has consistently made the weekly check-in meetings, in which they go over Student's assignments and develop a plan to turn in the assignments. If Student does not know what assignments Student's needs to complete, they will contact teachers and Student will sometimes sit with the psychologist to do Student's assignments. Students also comes to the psychologist when Student needs and emotion "reset." Student seems happier and [REDACTED] joined the cheerleading team and as a result Student attends school more regularly. (Witness 5's testimony)
29. Student mother believes that Student does not have good relationships with peers. Student is easily to anger. When Student gets in a mood, Student even shuts down with the few close friends Student has at School A. Student seems to have little on no relationship with teachers. Student seems to hate school and resents that Petitioner insists that Student stay at School A. (Mother's testimony)
30. Student has been struggling with math and with reading and is doing just enough to pass. Student would like classwork broken down as much as possible to Student's understanding. The teachers have office hours and have tried to help Student, but Student often does not understand the teaching method and often does not know what a teacher is talking about in class. Student can often read something in class and not comprehend what was read. When Student gets depressed at school, Student isolates. Student believes that principally the Seciton 504 plan allows Student to take breaks when needed. However, this was an accommodation Student had prior to the 504 plan. The 504 plan has been insufficient in meeting Student's academic needs. (Student's testimony)

CONCLUSIONS OF LAW:

Pursuant to IDEA §1415 (f)(3)(E)(i), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education ("FAPE").

Pursuant to IDEA §1415 (f)(3)(E)(ii), in matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parent's opportunity to participate in the decision-making

process regarding the provision of FAPE, or caused the child a deprivation of educational benefits. An IDEA claim is viable only if [DCPS'] procedural violations affected the student's substantive rights." *Lesesne v. District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)

34 C.F.R. § 300.17 provides:

A free appropriate public education or FAPE means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part; (c), Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of Sec. 300.320 through 300.324

Pursuant to 5E DCMR 3030.14, the burden of proof is the responsibility of the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Petitioners held the burden of persuasion on all issues adjudicated.⁷ The burden of persuasion shall be met by a preponderance of the evidence. The normal standard is a preponderance of the evidence. See, e.g., *N.G. V. District of Columbia* 556 f. Sup. 2d (D.D.C. 2008) see also 20 U.S.C. §1451 (i)(2)(C)(iii).

ISSUE 1: Did DCPS deny Student a FAPE by failing to identify Student as eligible for special education services under the classification of emotional disturbance (“ED”) based on the data that was available at the eligibility meeting held in September 2022, and/or to timely develop an individualized education program for Student?

Conclusion: Petitioner sustained the burden of proof by a preponderance of the evidence that DCPS should have found Student eligible for special education and related services at the September 14, 2022, eligibility meeting.

As an initial matter, the process for determining eligibility for special education is set forth in 34 C.F.R. 300.306, which requires a group of qualified professionals and the parent to determine whether the child has a disability by carefully considering not only the student's assessments, but significant additional information, drawing on a variety of sources and including parental input, teacher recommendations and other information. To qualify as a child with a disability under the

⁷ DC Code § 38-2571.03 (6) provides:

(A) In special education due process hearings occurring pursuant to IDEA (20 U.S.C. § 1415(f) and 20 U.S.C. § 1439(a)(1)), the party who filed for the due process hearing shall bear the burden of production and the burden of persuasion; except, that:

(i) Where there is a dispute about the appropriateness of the child’s individual educational program or placement, or of the program or placement proposed by the public agency, the public agency shall hold the burden of persuasion on the appropriateness of the existing or proposed program or placement; provided, that the party requesting the due process hearing shall retain the burden of production and shall establish a prima facie case before the burden of persuasion falls on the public agency. The burden of persuasion shall be met by a preponderance of the evidence.

(ii) Where a party seeks tuition reimbursement for unilateral placement, the party seeking reimbursement shall bear the burden of production and the burden of persuasion on the appropriateness of the unilateral placement; provided, that the hearing officer shall have the authority to bifurcate a hearing regarding a unilateral placement; provided further, that if the hearing officer determines that the program offered by the public agency is appropriate, it is not necessary to inquire into the appropriateness of the unilateral placement.

(B) This paragraph shall apply to special education due process hearings resulting from complaints filed after July 1, 2016.

IDEA, Student must have both a listed concern, such as OHI or SLD, and as a result, be in need of special education and related services. See 34 C.F.R. 300.8; *Parker v. Friendship Edison Pub. Charter Sch.*, 577 F. Supp. 2d 68, 74 (D.D.C. 2008).

The term "child with a disability" is defined in the IDEA regulations as a child evaluated in accordance with 34 CFR §§ 300.304 through 300.311 as a child . . . having one or more defined disabilities, "and who, by reason thereof, needs special education and related services." 34 CFR § 300.8(a), (b). It is up to each state to develop criteria to determine whether a child has a disability. See U.S. Department of Education, Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46579, 46648 (August 14, 2006).

Although School A considered Student's eligibility under three disability classifications, Petitioner has specifically challenged and asserts that Student should have been determined eligible under the ED classification.

The evidence demonstrates that Student was hospitalized for a suicide attempt in October 2021 and was diagnosed with a Depressive Disorder. School A was aware of the suicide attempt, hospitalization, and diagnosis. School A put measures in place to address Student's being able to complete class assignments and attempted to put some social emotional interventions in place that apparently did not continue due to Student's reluctance to participate. Nonetheless, the evidence indicates that Student's diagnosed condition and the resulting depression continued to impact Student. Student's academic performance during SY 2021-2022 resulted in Student withdrawing from a class and failing a class.

The testimony presented by the School A witnesses who taught and provide Student services indicate that Student struggles academically and Student's emotions are a factor in Student's struggle with academic performance. The School A psychologist noted Student's disorder impacts Student's motivation and willingness to complete assignments and Student's energy to complete daily tasks. Student's teacher noted that in some classes Student continues to struggle, and Student is currently failing a class. In class Student is usually more engaged with Student's cell phone and connecting with peers, rather than focusing on the instruction. Not to mention, that Student's basic academic skills, as assessed by the DCPS psychologist, although were deemed most average, other than in the area of written expression, Student's academic functioning is well below age and grade level.

The DCPS psychologist who evaluated Student concluded that Student met one criterion under IDEA for ED disability, specifically "a general pervasive mood of unhappiness or depression." Nonetheless, the evaluator concluded Student did not meet the criteria for ED, principally because Student had not been provided and received two researched based interventions prior to the consideration of Student's identification as ED.

Pursuant to IDEA, emotional disturbance of ED means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings

under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems. (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

Although it appears that OSSE has mandated that an additional and initial criterion be included in the analysis of the ED disability classification, this is not a criterion mandated by IDEA. There was no evidence or authority provided during the hearing for this additional to be imposed on this Student. Particularly, when the evidence demonstrates that the two interventions that are now required by OSSE did not occur because School A did not follow through to ensure they were implemented. The onus for the interventions to have been tried and monitored seems to have been shifted to the Student.

Although DCPS presented two expert psychologists who both testified that Student did not meet the eligibility requirements, neither provided an explanation as to why the interventions were not instituted. Rather, the evaluator states in the evaluation that Student's eligibility should be reconsidered after the interventions are tried. It was still not clear from the evidence that the 504 plan or the periodic check-ins with the School A psychologist would qualify as "two scientific research-based interventions that are based on a problem-solving model that addresses behavioral/emotional skill deficiency and documentation of the results of the intervention, including progress monitoring documentation."

The IHO concludes that because Student has met one criterion under IDEA's ED disability definition and there is evidence that Student's disability of Depressive Disorder has and continues to impact Student's education performance, Student should not be penalized by a finding of ineligibility because School A did not follow through with actions that should have been taken sooner.

Consequently, based on the evidence adduced, the IHO concludes that Student is eligible for special education and related services under the disability classification of ED. In the order below, the IHO directs DCPS to promptly develop an IEP for Student.

ISSUE 2: Did DCPS deny Student a FAPE by failing to timely and comprehensively evaluate for special education pursuant to its child find obligations under the IDEA within two years prior to the filing of the complaint?

Conclusion: Petitioner did not sustain the burden of proof by a preponderance of the evidence on this issue.

Under the IDEA, states, as well as the District of Columbia, that receive federal educational assistance must establish policies and procedures to ensure that a FAPE is made available to disabled children. *Reid v. District of Columbia*, 401 F.3d 516, 519 (D.C.Cir. 2005). Under the Act's child-find requirement, the District must "ensure that '[a]ll children with disabilities residing in the [District] . . . who are in need of special education and related services are identified, located, and evaluated.'" *Scott v. District 18 of Columbia*, 2006 WL 1102839, at 8 (D.D.C. Mar. 31, 2006)

(quoting Reid); 20 U.S.C. § 1412(a)(3). "As soon as a child is identified as a potential candidate for services, DCPS has the duty to locate that child and complete the evaluation process." *Long v. District of Columbia*, 780 F.Supp.2d 49, 56 (D.D.C.2011). The District must conduct initial evaluations to determine the student's eligibility for special education services "within 120 days from the date that the student was referred [to DCPS] for an evaluation or assessment." *Id.* (quoting former D.C. Code § 38-2561.02(a)). Once the eligibility determination has been made, the District must conduct a meeting to develop an IEP within 30 days. 34 CFR § 300.323(c)(1); G.G. ex rel. *Gersten v. District of Columbia*, 924 F.Supp.2d 273, 279(D.D.C.2013).

The U.S. Department of Education's long-standing position is that a parent's request for an eligibility evaluation does not automatically precipitate the obligation of the LEA to conduct the evaluation. Rather, an LEA must conduct an evaluation without undue delay only if the LEA suspects that the child has a disability and is in need of special education and related services. See *Letter to Anonymous*, 21 IDELR 998 (OSEP 1994). The LEA's duty to conduct an initial evaluation is triggered when the LEA has reason to suspect a disability and reason to suspect that special education services may be needed to address that disability. See *Board of Education of Fayette County v. L.M.*, 45 IDELR 95 (E.D.Ky. 2006). "A suspicion connotes a relatively low threshold." *Id.* A state or LEA "shall be deemed to have knowledge that a child is a child with a disability if [among other things] . . . the behavior or performance of the child demonstrates the need for such services." *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001) (citing 20 U.S.C. § 1415(k)(8)(B)(ii)).

Petitioner asserts that DCPS should have evaluated Student far sooner than School A did, and at least at the time that Student was first diagnosed with Depressive Disorder upon Student's release from hospitalization. However, the evidence reflects that prior to the emotional break-up that Student experienced in October 2021, Student's academic performance had been at least average.

Although, there was assessments data collected prior to Student arriving at School A, that showed Student was operating below grade level in reading and math, Student had applied to and been accepted to School A, an admission only and highly academic school, and Student had performed relatively well in ■■■ first two school years at School A. Despite the testimony of Petitioner's witness that DCPS should have initiated evaluations on its own prior to Petitioner's request, the evidence does not support this conclusion. Although there was some testimony that School A had considered the Student Support Team propose to assist Student prior to SY 2021-2022, the IHO did not find this testimony particularly credible when compared to Student's grades and steady accumulation of credits toward a high school diploma.

Once Student was hospitalized and return to school in October 2021, School A put assistance in place for Student to catch up on and maintain ■■■ academic assignments. Despite this assistance, Student's performance for the remainder of SY 2021-2022 was lacking. It seems reasonable to this IHO that based upon Student's diagnosis in October 2021 and resulting academic faltering that became clear by the end of SY 2021-2022, that Student's evaluation for special education was appropriate at the end of SY 2021-2022, and coincided with the request made by Petitioner for initial evaluations. Consequently, the IHO does not conclude based on the evidence adduced that DCPS should have or failed to evaluate Student under its child find obligations prior to when the evaluations were initiated. Petitioner did not sustain the burden of persuasion on this issue.

Petitioner has also asserts that DCPS' evaluation of Student was not sufficiently comprehensive because it did not include a speech and language evaluation, and the psychological evaluation did not include a classroom observation and teacher rating scales.

Pursuant to 34 C.F.R. § 300.304 (c), a school district must ensure that a student has been appropriately evaluated in all areas of suspected disability. D.C. law requires that "a full and individual evaluation is conducted for each child being considered for special education and related services." D.C. Mun. Regs. Title. 5E, § 3005.1 (2006). "Qualified evaluators [are to] administer tests and other assessment procedures as may be needed to produce the data required" for the MDT to make its determinations. D.C. Mun. Regs. Title. 5E § 3005.5 (2006).

Generally, when a child has been evaluated for special education eligibility, and the appropriateness of the agency's evaluation is at issue, the hearing officer must consider whether the agency adequately gathered functional, developmental and academic information about the child's needs to determine the content of the IEP in all areas of suspected disability and that the evaluation was sufficiently comprehensive to identify all of the child's needs. 20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(1-3); 34 C.F.R. §300.304(b)(1-3), (c)(4, 6).

The evidence demonstrates that Petitioner requested a speech language evaluation in addition to the evaluations that were conducted and Petitioner is challenging the psychological evaluation that was conducted. The evidence demonstrates that the psychologist did not assess Student for OHI/ADHD because school was not in session at the time. That assessment was later conducted and an addendum to the evaluation was completed, although after Petitioner had filed her DPC. Based upon a review of that evaluation addendum, it does not appear that Student's has qualifies for this additional disability classification.

However, that determination should ultimately be made by a team who can review that evaluation. Absence evidence, other than Petitioner's witness on this issue, the Hearing Officer concludes there is insufficient evidence that the DCPS in not conducting and reviewing that assessment prior to the eligibility determination is at best a procedural violation. In addition, there is no evidence that Student has any speech language issues that would have warranted a speech language evaluation. As to a classroom observation being conducted by the evaluator, there is no requirement under IDEA that such an observation be conducted. Again, at best any failure to conduct a classroom observation is at best a procedural violation. Consequently, the IHO concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

ISSUE 3: Did DCPS deny Student a FAPE by failing to provide the Petitioner with access to Student's educational records?

Conclusion: Petitioner did not sustain the burden of persuasion by a preponderance of the evidence on this issue.

IDEA regulations afford parents and their legal representatives an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational

placement of the student and the provision of a FAPE to the student. See 34 CFR § 300.501(a); *Friendship Edison Public Charter School Collegiate Campus v. Murphy* 2006 WL 2711524, 4 (D.D.C.2006). DCPS must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency. See 34 CFR § 300.613(a). Under the IDEA and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

The District of Columbia Municipal Regulations (“DCMR”) provide that DCPS must honor the records request as soon as possible, but in no case in more than 45 calendar days. 5E DCMR § 2600.6. Failure to timely comply with a parent’s request to inspect education records is a procedural violation of the IDEA. See, e.g., *N.P. v. E. Orange Bd. of Educ.*, No. CIV. 06-5130 DRD, 2011 WL 463037 at 7 (D.N.J. Feb. 3, 2011) (procedural violations of the IDEA by failing to timely respond to parent’s requests for records.)

The evidence demonstrates that DCPS provided Petitioner’s Counsel Student’s educational records. However, there were apparently educational records that were not provided to Petitioner until DCPS filed its disclosures for this due process hearing. The evidence, however, does not demonstrate that Petitioner or her representative ever went to School A to inspect Student’s educational records. Absent any evidence that there was an attempt by Petitioner to do so, and a refusal by DCPS, there IHO cannot conclude that there is any procedural violation, much less a denial of a FAPE in this regard.

Consequently, the Hearing Officer concludes that Petitioner did not sustain the burden of persuasion by a preponderance of the evidence that there are any of Student’s education records that have not already been provided to Petitioner. There is insufficient evidence that DCPS significantly impeded Petitioner’s opportunity to participate in the decision-making process regarding the provision of a FAPE to Student, or caused Student a deprivation of educational benefits.

Remedy:

A hearing officer may award appropriate equitable relief when there has been an actionable violation of IDEA. See 20 U.S.C. § 1415(f)(3)(E)(ii)(II); *Eley v. District of Columbia*, 2012 WL 3656471, 11 (D.D.C. Aug. 24, 2012) (citing *Branham v. District of Columbia*, 427 F.3d at 11–12.) The Hearing Officer has concluded that Student was denied a FAPE by DCPS and has directed that DCPS, in the order below, remedy that denial.

Under the theory of compensatory education, “courts and hearing officers may award educational services to be provided prospectively to compensate for a past deficient program. The inquiry must be fact-specific and, to accomplish IDEA’s purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” Reid, 401 F.3d 522 & 524. To aid the court or hearing officer’s fact-specific inquiry, “the parties must have some opportunity to present evidence regarding [the student’s] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.” Id. at 526.

Although Petitioner presented a compensatory education proposal, the IHO notes that no IEP has yet been developed for Student from which to determine what if any services were missed, much less what would adequately compensate Student for any loss. Therefore, the IHO directs in the order below that Petitioner to pursue compensatory education in another proceeding, if need be, after DCPS has developed Student's IEP.

ORDER: ⁸

1. Student is hereby determined eligible as a child with a disability under IDEA with a disability classification of ED.
2. DCPS shall, within ten (10) business days of the date of this order, convene an IEP meeting to review Student's evaluations and data and develop an appropriate IEP for Student.
3. Petitioner shall have the right to pursue, in due process hearing, if need be, a compensatory education award based the denials of FAPE determined in this HOD for DCPS's failure find Student eligible as of September 14, 2022.
4. All other claims raised in Petitioner's DPC that the IHO did not find were a denial of a FAPE are hereby dismissed with prejudice and all other relief requested by Petitioner is denied.

APPEAL PROCESS:

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer shall have ninety (90) days from the date of the decision of the Hearing Officer to file a civil action with respect to the issues presented at the due process hearing in a District Court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. §1415(i)(2).


/S/ *Coles B. Ruff*

Coles B. Ruff, Esq.

Hearing Officer

Date: January 25, 2023

Copies to: Counsel for Petitioners
 Counsel for LEA
 OSSE-SPED {due.process@dc.gov}
 ODR due.process@dc.gov
 {hearing.office@dc.gov}



⁸ Any delay in Respondent meeting the timelines of this Order that is the result of action or inaction by Petitioner shall extend the timelines on a day for day basis.